

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 19-0427

JULIA A. ENGBLOM)	
)	
Claimant-Respondent)	
)	
v.)	
)	
GEORGIA-PACIFIC CORPORATION)	
)	DATE ISSUED: 12/15/2020
and)	
)	
ACE AMERICAN INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Order on Remand of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Theodore P. Heus (Preston Bunnell, LLC), Portland, Oregon, for Claimant.

Stephen E. Verotsky (Sather Byerly & Holloway, LLP), Portland, Oregon, for Employer/Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge Christopher Larsen's Order on Remand (2015-LHC-01864; 2015-LHC-01865; 2015-LHC-01866) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in

accordance with applicable law. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for the second time. On June 15, 2012, Claimant suffered a neck strain when the forklift she was operating struck a metal plate, causing her to stop abruptly. She missed some time from work as a result of this incident and, after returning to work, reported worsening lower back and extremity pain. On September 11, 2014, Claimant suffered a second injury at work when she tripped, fell and landed on her left hand, fracturing her left ring finger. Claimant was eventually diagnosed with carpal tunnel syndrome and underwent a left carpal tunnel release. Employer paid Claimant temporary total disability benefits from September 12, 2014 to May 14, 2015. Claimant also suffered increased back symptoms after she stopped working on September 11, 2014. She underwent spinal fusion surgery on April 11, 2015, and subsequently reported pain in her right buttock, numbness in her right foot, and “drag” in her leg. On May 16, 2015, Dr. Adler released Claimant to modified work, restricting her from lifting more than 15 pounds, operating machinery, pushing or pulling, and from working more than eight hours. Claimant testified she is unable to return to her usual work because of her back pain and that in order to work, she would have to take narcotics, which would make it impossible for her to drive. She also stated her foot drag would negatively affect her ability to drive a forklift.

Claimant filed claims for benefits for her 2012 cervical injury and the September 11, 2014 injury to her left hand. On April 23, 2015, she filed a separate claim for a cumulative back injury, with a date of injury of September 11, 2014, that being her date of last employment.

In his initial Decision and Order Awarding Benefits, the administrative law judge found Claimant established her lumbar condition is work-related and she made a prima facie case of total disability. The administrative law judge found Employer failed to establish the availability of suitable alternate employment.¹ Finding Claimant’s lumbar condition became permanent on December 28, 2014, the administrative law judge awarded

¹ In addressing the extent of Claimant’s disability, the administrative law judge discussed the labor market survey Employer submitted, which listed 13 positions, and noted Claimant applied to three of the jobs, was rejected by two of them, and testified she never heard back from the third one. The administrative law judge also rejected a number of other positions as unsuitable for Claimant based on her work experience and abilities, leaving only three positions allegedly suitable for Claimant. The administrative law judge concluded that the identification of three positions does not establish suitable alternate employment and therefore Claimant is totally disabled.

Claimant temporary total disability benefits from September 12, 2014 through December 28, 2015, and ongoing permanent total disability benefits from December 29, 2015. He also held Employer liable for Claimant's back surgery.

Employer appealed the administrative law judge's findings that Claimant's lumbar condition is work-related and that it failed to establish suitable alternate employment. In its Decision and Order, the Benefits Review Board affirmed the administrative law judge's finding that Claimant established her lumbar condition for which she required surgery is related to her employment as a forklift driver and his consequent conclusion that Employer is liable for the medical care of that condition. *Engblom v. Georgia-Pacific LLC*, BRB No. 17-0662 (July 31, 2018), slip op. at 4-6. The Board rejected Employer's contention that the administrative law judge erroneously found four customer service jobs are not suitable alternate employment, stating he permissibly concluded Claimant's lack of customer service experience made such jobs realistically unavailable to her, and that a job as a production scheduler with Cascadia was unavailable based on Claimant's testimony that she was informed the position was filled. The Board agreed with Employer that the administrative law judge erroneously concluded the remaining three jobs identified in Employer's labor market survey are insufficient to establish suitable alternate employment. *Id.* at 8. The Board therefore vacated the finding that Employer did not establish suitable alternate employment and remanded the case for the administrative law judge to reconsider the suitability of the three remaining jobs to determine if Employer established suitable alternate employment. *Id.*

In his Order on Remand, the administrative law judge addressed the three remaining jobs in Employer's April 29, 2016 labor market survey and determined each is unsuitable for Claimant. The administrative law judge thus found Employer failed to establish the availability of suitable alternate employment and Claimant has been totally disabled since September 12, 2014.

On appeal, Employer challenges the administrative law judge's finding that it did not establish the availability of suitable alternate employment. Claimant responds, urging affirmance. Employer filed a reply brief.

Where, as in this case, Claimant established her inability to return to her usual job due to her work injuries, the burden shifts to Employer to demonstrate that suitable alternate employment is available in Claimant's community. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). It is Employer's burden to show the realistic availability of jobs suitable for Claimant given her age, education, and vocational and medical capabilities, and that she could secure the

jobs if she diligently sought them. *See Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988).

With regard to the sales consultant position at an AT&T retail store, the administrative law judge found Claimant's lack of customer service experience made the position unsuitable and her unsuccessful application for the position made it unavailable to her. Order at 3-4; EX 44 at 208v. The administrative law judge found the log truck dispatcher position with Weyerhaeuser is primarily sedentary and requires "efficient" typing skills.² EX 44 at 208ac. Based on his prior finding that Claimant does not have either the requisite typing or customer service skills required of this position, as well as Claimant's testimony that she could not sit for the time the position required, the administrative law judge concluded this position is unsuitable for Claimant. Order at 4. The administrative law judge addressed the cashier position with Home Depot, noting this position required "constant standing and walking." *Id.* at 4-5; CX 44 at 208w, x. Finding Claimant's testimony supports a conclusion that she cannot stand or walk for eight hours a day with only standard breaks, the administrative law judge concluded Claimant cannot perform the physical requirements of the cashier position and, consequently, the position is unsuitable for her. Order at 5. Thus, he concluded Claimant is totally disabled.

It is well-established that an administrative law judge is entitled to weigh the evidence and draw his own inferences from it and the Board may not substitute its view for those of the administrative law judge. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). Employer did not present evidence to contradict Claimant's testimony that she unsuccessfully sought employment as a retail sales consultant with AT&T; consequently, the administrative law judge rationally determined that this position was unavailable to Claimant. With regard to the Weyerhaeuser and Home Depot positions, the administrative law judge considered the positions' requirements in light of Claimant's testimony regarding her vocational and physical abilities and permissibly concluded these positions are unsuitable for her. As the administrative law judge's findings on remand are rational and supported by substantial evidence, we affirm his finding these positions do not establish the availability of suitable alternate employment. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004). Therefore, we affirm the administrative law judge's determination that Claimant's total disability commenced on September 12, 2014.

² The description of this position states that 75 percent of the time it is performed "while in a sitting position." EX 44 at 208ac.

Accordingly, we affirm the administrative law judge's Order on Remand.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge